

STATE OF ARIZONA
OFFICE OF ADMINISTRATIVE HEARINGS

S. M., a minor, by and through parents S.
M. and L. M.,

No. 04F-II04010-ADE

Appellant/Petitioner,

-v-

Globe Unified School District,

Respondent.

ADMINISTRATIVE
LAW JUDGE
DECISION
(LEVEL II REVIEW)

This is a final administrative appeal brought by S. M. and L. M. ("Parents"), on behalf of S. M. ("Student"), for review of a Due Process Hearing Officer's Decision and Order upholding an Individualized Educational Program ("IEP") and affirming decisions made regarding the Student's education by Respondent Globe Unified School District ("Respondent School District").¹ Pursuant to Arizona Revised Statutes (A.R.S.) §§ 41-1092.01(E) and 41-1092.02, the Arizona Department of Education referred this matter to the Office of Administrative Hearings for final administrative hearing appeal as provided in Arizona Administrative Code (A.A.C.) R7-2-405(J). The law governing these proceedings is the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400-1487 (as re-authorized and amended in 1997), and its implementing regulations, 34 C.F.R. Part 300, as well as the Arizona Special Education ("SPED") statutes, A.R.S. §§ 15-761 through 15-772, and implementing rules, A.A.C. R7-2-401 through R7-2-406. Parents and Student are represented by attorney M. Alex Harris. Respondent School District is represented by attorney Denise Bainton.

On October 27, 2003, Parents filed a request for due process hearing challenging an Individualized Educational Program ("IEP") and the process used by Respondent School District to create it. The evidentiary hearing on the initial request was conducted over the course of several days on January 6, 7 and 9, 2004. Parents

¹ This Administrative Law Judge Decision will use most of the designations in the Identity Key created and used by the Due Process Hearing Officer to protect Student's confidentiality. The exceptions are "Student" and "Parents," which have been identified above.

1 filed a supplemental request on January 12, 2004;² hearing regarding the supplemental
2 request took place on May 20 and 21, 2004, and June 21, 2004. The Level I Hearing
3 Officer's Decision was issued on September 7, 2004, determining that Respondent
4 School District's actions were appropriate and in conformity with the law and that the
5 IEP offered Student a free, appropriate public education. Parents filed a timely appeal
6 on September 30, 2004. At Parents' request, this Administrative Law Judge ordered
7 the parties to file briefs for the Level II appeal. The final brief was filed on December
8 13, 2004. Because of the large record for review, the parties agreed to extend the time
9 for issuing a decision to February 4, 2005, and this matter has been under advisement
10 throughout December 2004 and January 2005.³

11 The record reviewed by this Administrative Law Judge consists of Parents' initial
12 and supplemental due process complaints; prehearing correspondence and orders
13 (including the Hearing Officer's Order on Motion for Partial Dismissal, issued March 31,
14 2004); six volumes of hearing transcripts (approximately 950 pages); numerous exhibits
15 admitted into evidence at the hearing; a VHS videotape of a portion of the hearing on
16 January 7, 2004;⁴ the Due Process Hearing Officer's Decision issued by Hearing Officer
17 Harold J. Merkow (hereinafter "Hearing Officer's Decision"), and Parent's request for
18 appeal. Based on a review of the record and consideration of the parties' Level II
19 Review Briefs, this Administrative Law Judge makes the following Decision upholding
20 the Hearing Officer's Decision in its entirety.

21 DECISION

22 Standard of Review

23 This is a second-level administrative review. Both federal and state law require
24 that the reviewing official "make an independent decision." 20 U.S.C. § 1415(g); see
25 also A.A.C. R7-2-405(J)(1)(b)(i) and (v). This tribunal may exercise non-deferential
26 review, except that deference will be given to any findings of a hearing officer based on
27 credibility judgments. *Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877, 889 (9th Cir.
28 2001); *Carlisle Area School v. Scott P.*, 62 F.3d 520, 529 (3d Cir. 1995). Therefore, this

29 ² With an amendment on January 28, 2004.

30 ³ The vast majority of this Administrative Law Judge's time has been spent reviewing the lengthy record.

⁴ This Administrative Law Judge has viewed the videotape.

1 tribunal is not generally bound by a hearing officer's factual or legal conclusions. Like
2 the first-level hearing officer, this tribunal must determine whether Respondent School
3 District has met all requirements of federal and state law, rules, and regulations
4 concerning provision of a free appropriate public education for children with disabilities.
5 See A.A.C. R7-2-405(H)(4)(a).

6 Level I Hearing

7 The Issues at Hearing

8 The Hearing Officer articulated seven issues for the Level I decision: (1) Failure
9 to provide Parents with "educational records;" (2) Failure to provide the type and
10 amount of related services that Student is entitled to; (3) Failure to complete the IEP in
11 a timely manner; (4) Failure to use sign language as much as it should be used in
12 Student's education; (5) Failure to have the IEP team make all changes in the IEP; (6)
13 Failure to provide services in the manner written in the IEP; and (7) Failure to provide
14 appropriate instruction that will accord Student a free appropriate public education.
15 Included within these issues were two prominent allegations concerning the use of sign
16 language in Student's instruction and an assessment of Student's behaviors. This
17 tribunal finds the Hearing Officer to have accurately stated the issues in dispute.⁵

18 For the reasons stated below, this tribunal affirms the Hearing Officer's Decision
19 in its entirety. The evidence and law supports the conclusion that Respondent School
20 District has complied with its obligations under Federal and State special education law
21 and has provided Student a free appropriate public education. The evidence does not
22 support awarding Parents any compensatory education or services.

23 Summary of the Facts

24 To give a background, the factual findings of the Hearing Officer's Decision are
25 briefly summarized as follows:⁶

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27 ⁵ The Hearing Officer stated the issues in different terms than Parents; he combined the items specified
28 by Parents under broader categories. This was necessary because Parents' allegations kept shifting
29 during the hearing. They started with seven allegations (with sub-issues) in the initial request, then added
30 five (with sub-issues) in the supplemental request, and ended with ten in their written closing argument. In
addition, some of the issues were dealt with in the partial dismissal that was granted in March 2004.
Thus, it was necessary and proper for the Hearing Officer to collate and combine issues in order to
address them in an organized manner.

⁶ The relevant period is the 2001-2002 and 2003-2004 school years.

1 Student [REDACTED] attends high school in the Respondent School District.
2 Parents are the legal guardians of Student, who is eligible for education and services
3 until he turns 22-years-old. He suffers from [REDACTED]
4 [REDACTED] a rare condition that manifests symptoms of severe mental retardation,
5 [REDACTED] Student is [REDACTED]
6 [REDACTED] He also has physical
7 problems [REDACTED]
8 [REDACTED] unable to perform activities of daily living (ADLs) without close supervision and
9 assistance.⁷ He has a one-on-one aide. He has no concept of danger or unsafe
10 conditions and must be watched closely.

11 Student is in a self-contained classroom at Respondent School District's high
12 school and receives education and services (speech therapy, occupational therapy,
13 physical therapy, and adaptive PE) under a lengthy and detailed IEP. Although Student
14 is not hearing impaired and can verbalize words, he uses both verbalization and a very
15 limited form of sign language, along with gestures, to communicate. The sign language
16 component is written into Student's IEP. However, Student's school instructors are of
17 the opinion that Student does not get much benefit, if any, from that component.

18 There are also behavior concerns with Student. He is easily distracted by certain
19 things and must be supervised with skill. Respondent School District has assessed
20 Student's behaviors, observed him in a variety of settings, and has incorporated a
21 behavior plan into the current IEP.

22 The Hearing Officer's Decision

23 The Findings of Fact stated in the Hearing Officer's Decision are found to be
24 thorough, accurate, and complete, and are adopted and incorporated into this Decision.
25 Also, the Hearing Officer's conclusions and discussions of the issues are accurate and
26 are supported by the record and law. There is no evidence in the record sufficient to
27 overturn the Hearing Officer's Decision.

28 After hearing and considering all the evidence and Parents' arguments, the
29 Hearing Officer found against Parents on every issue. He found that Respondent

30 ⁷ Student's medical and physical conditions are stated in Hearing Officer's Decision at 5.

1 School District complied with the procedural and substantive requirements of the IDEA.
2 He focused mainly on the sign language and behavioral plan issues, and concluded
3 that Respondent School District has not violated special education law. He also found
4 no merit to Parents' other claims. He addressed those other claims, but rightly
5 characterized them as "trivial and superficial."⁸ The evidence supports all of those
6 conclusions. There are no substantial errors in the Hearing Officer's Decision.

7 Level II Review

8 The Issues on Appeal

9 On appeal, Parents have set forth the same ten arguments from their written
10 Level I closing argument. It is noted that Parents' appeal is characterized by a lack of
11 citation to any legal authority and the failure to relate many of the arguments to the
12 IEP.⁹ This fails to give the arguments any significant impact. Nevertheless, this tribunal
13 has conducted an "independent" review of the entire record, as it is required to do. The
14 conclusions reached are the same as those of the Hearing Officer.

15 Discussion

16 Through the IDEA, Congress has sought to ensure that all children with
17 disabilities are offered a free appropriate public education that meets their individual
18 needs. 20 U.S.C. §1400(d); 34 C.F.R. § 300.1. These needs include academic, social,
19 health, emotional, communicative, physical, and vocational needs. *Seattle Sch. Dist.*
20 *No. 1 v. B.S.*, 82 F.3d 1493, 1500 (9th Cir. 1996) (quoting H.R. Rep. No. 410, 1983
21 U.S.C.C.A.N. 2088, 2106). A free appropriate public education must consist of
22 "personalized instruction with sufficient support services to permit the child to benefit
23 educationally from that instruction." *Hendrick Hudson Central Sch. Dist. Bd. of Educ. v.*
24 *Rowley*, 458 U.S. 176, 204 (1982).

25 The record shows that the child is receiving instruction from Respondent School
26 District that permits him to gain educational benefit. His classroom teacher and
27 personal aide are working carefully on his goals as they are spelled out in his IEP. His
28 IEP is based on reliable and sufficient information and is crafted to enable Student to
29 achieve reasonable goals. And the related services providers are conscientiously

30 ⁸ *Id.* at 52.

1 working with Student to improve his physical abilities. The evidence is clear that
2 Student is receiving the instruction and services that the law mandates.

3 This tribunal will not address every issue raised by Parents. Most of the issues
4 are truly trivial, if not ridiculous.¹⁰ These trivial issues have been addressed as much as
5 is warranted by the Hearing Officer.¹¹ Thus, they will not be addressed here. However,
6 what this tribunal sees as Parents' main issues, regarding sign language and behavioral
7 interventions, merits some discussion.

8 The record overwhelmingly supports the conclusion that sign language is a
9 "dead-end" for Student. The witnesses with the most training and experience and that
10 know Student best testified that signing does not increase development of Student's
11 communication skills. Indeed, it appears that signing is superfluous. Perhaps at an
12 earlier point in Student's life it was helpful to him, but it is no longer. Now, it takes time
13 and focus away from verbalization.¹² This tribunal agrees with the Hearing Officer that
14 sign language is not only unnecessary, but counterproductive to Student's progress.
15 Thus, Parents arguments based on the sign language component of the IEP are
16 without merit.

17 There is also a behavioral component to Student's IEP. It provides a plan for
18 behavior interventions in various situations.¹³ Parents allege inadequacies of both the
19 assessment process and content of that component.

20 Under the law, a "functional behavioral assessment" and "behavior intervention
21 plan" must be created after certain disciplinary actions have been taken,¹⁴ which is not
22 the case here. In addition, behaviors that impede learning must be considered when
23 developing an IEP, and the IEP team must, when appropriate, identify behavior
24 intervention strategies to address the behaviors.¹⁵ Thus, performing a functional
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26 ⁹ This seems to be a pattern with Parents; it has occurred throughout the due process proceeding.

27 ¹⁰ One example is Parents' argument regarding the computer discs. *Id.* at 48-49.

28 ¹¹ See Hearing Officer's Decision at 41-53.

29 ¹² It is noted that when Student is working on verbalization, the word is "signed" and he is encouraged to
30 say the word out loud. He appears to respond well enough to the verbal encouragement. There is no
competent evidence showing that the singing is adding anything to the mix.

¹³ Hearing Officer's Decision at 15-17.

¹⁴ 20 U.S.C. §1415(k)(1)(B)(i).

¹⁵ 20 U.S.C. §1414(d)(3)(B)(i); 34 C.F.R. § 300.346(a)(2)(i), (c), and (d)(1).

1 behavioral assessment may be the means that the IEP team uses to develop behavior
2 intervention strategies for the IEP. This was the case with Student.

3 Once again, this tribunal is in full agreement with the Hearing Officer.¹⁶ The
4 assessments were made and provided adequate information from which to form
5 intervention strategies. The assessment was complete enough to adequately inform
6 the IEP team, who then addressed the behaviors. If Student's IEP changes in the
7 future and more information is needed concerning Student's behaviors in certain
8 settings, that information can be gathered at that time.

9 In sum, the Hearing Officer conducted a fair and impartial hearing of the
10 evidence that was relevant and probative to the issues identified by the parties. The
11 evidence supports the Hearing Officer's conclusions that Respondent School District
12 complied with the procedural and substantive requirements of the IDEA.
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¹⁶ See, Hearing Officer's Decision at 36-41.

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ORDER

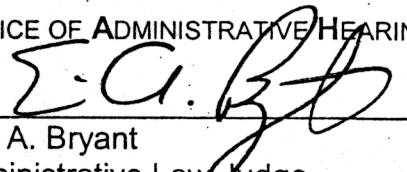
Based on the discussion above, the Hearing Officer's Decision is affirmed.

RIGHT TO SEEK JUDICIAL REVIEW

Pursuant to Arizona Administrative Code (A.A.C.) R7-2-405(22), this Decision and Order is the final decision at the administrative level. Any party aggrieved by the findings and decisions made in a hearing or in an appeal review has the right to judicial review. Any action for judicial review must be filed within 35 days of the date that the Decision and Order was mailed to the parties.

Done this 4th day of February 2005.

OFFICE OF ADMINISTRATIVE HEARINGS


Eric A. Bryant
Administrative Law Judge

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